In the Supreme Court of the United States

OCTOBER, 1916, TERM.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, an Hawaiian Corporation, *Plaintiff in Error,* *vs.* GEORGE E. WARD, *Defendant in Error.*	Error to the Circuit Court of Appeals, Ninth Circuit.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS

Statement of the Case:

This is an action at law for damages for personal injuries sustained by defendant in error, and was originally brought in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, which is a Territorial and not a Federal Court. Upon the first trial, a motion for a non-suit was made, granted, and judgment of non-suit entered. The case was then taken on error to the Supreme Court of the Territory, which resulted in a reversal of the judgment, and a new trial ordered.

The case was again tried before a jury, and on the 19th day of June, 1914, a verdict was rendered in favor of defendant in error, and damages assessed at $13,000.00.

The case was again taken on error to the Supreme Court of Hawaii by plaintiff in error, and on the 24th day of March, 1915, the Supreme Court of Hawaii affirmed the judgment.

The plaintiff in error thereupon brought the case on error to the Circuit Court of Appeals for the Ninth Circuit, pursuant to the Act of Congress of January 28, 1915, ch. 22, same being "An Act to amend 'An Act to codify, revise and amend the laws relating to the judiciary,' approved March 3, 1911" (Federal Statutes Ann. Supplement 1916, p. 135-136). On the 15th day of May, 1916, the Circuit Court of Appeals unanimously affirmed the final judgment of the Supreme Court of Hawaii, and the case is now brought to this Court on error from the final judgment of said Circuit Court of Appeals.

The defendant in error now moves to dismiss this last writ of error upon the ground that this Court has no jurisdiction, first, in that the Act of January 28, 1915, made the judgment of the Circuit Court of Appeals final; second, that error does not lie from this Court to the Circuit Court of Appeals in cases of the character of the one at bar. *The record discloses no federal question.*

ARGUMENT

Under the provisions of Section 86 of "An Act to provide a Government for the Territory of Hawaii" (Act of April 30, 1900, 31 Sts. at L. 141, c. 339) the relations between the Federal and Territorial Courts were in general similar to those between the Federal

and State Courts; and cases could only be taken to this court by writ of error, where a federal question was involved, and could not be taken to the Circuit Court of Appeals as from other Territories of the United States.

Congress then passed the Act of March 3, 1905, (33 Sts. at L. s. 1465, c. 3) which allowed writs of error and appeals to this Court from the final judgments of the Supreme Court of Hawaii, where the amount involved, exclusive of costs, exceeded the sum or value of five thousand dollars, irrespective of any federal question. This act was incorporated in the Judiciary Act of March 3, 1911, and is found in Section 246 thereof.

Then came the Act of Congress of January 28, 1915, ch. 22, being "An Act to codify, revise and amend the laws relating to the judiciary," approved March 3, 1911, which among other things, transferred the appellate jurisdiction of this Court from the final judgment of the Supreme Court of Hawaii, where the amount involved, exclusive of costs, exceeded the sum or value of five thousand dollars, to the Circuit Court of Appeals for the Ninth Circuit. This is the latest act of Congress relating to appeals and error to this Court from the Courts of Hawaii.

Section 241 of the Judiciary Act of March 3, 1911, has no Application to this Case.

Section 6 of the Act of March 3, 1891, provides as follows:

"That the circuit courts of appeals established

"by this act shall exercise appellate jurisdiction to "review by appeal or by writ of error final decis- "ions in the district court and the existing circuit "courts in all cases other than those provided for "in the preceding section of this act, unless other- "wise provided by law, and the judgments or de- "crees of the circuit courts of appeals shall be final "in all cases in which the jurisdiction is depend- "ent entirely upon the opposite parties to the suit "or controversy, being aliens and citizens of the "United States or citizens of different States; also "in all cases arising under the patent laws, under "the revenue laws, and under the criminal laws and "in admiralty cases, excepting that in every such "subject within its appellate jurisdiction the circuit "court of appeals at any time may certify to the "Supreme Court of the United States any questions "or propositions of law concerning which it desires "the instruction of that court for its proper de- "cision. And thereupon the Supreme Court may "either give its instruction on the questions and "propositions certified to it, which shall be binding "upon the circuit courts of appeals in such case, "or it may require that the whole record and cause "may be sent up to it for its consideration, and "thereupon shall decide the whole matter in con- "troversy in the same manner as if it had been "brought there for review by writ of error or ap- "peal.

"And excepting also that in any such case as is "hereinbefore made final in the circuit court of ap-

"peals it shall be competent for the Supreme Court "to require, by certiorari or otherwise, any such "case to be certified to the Supreme Court for its "review and determination with the same power "and authority in the case as if it had been carried "by appeal or writ of error to the Supreme Court.

"In all cases not hereinbefore, in this section, "made final there shall be of right an appeal or "writ of error or review of the case by the Supreme "Court of the United States where the matter in "controversy shall exceed one thousand dollars be- "sides costs. But no such appeal shall be taken "or writ of error sued out unless within one year "after the entry of the order, judgment, or decree "sought to be reviewed. (26 Stat. L. 828)."

This section, subsequently, was re-enacted by Congress as Sections 128 and 241 of the Judiciary Act of March 3, 1911. It will be seen, therefore, that Section 241 of the Judicial Code was formerly the last paragraph of Section 6 of the Act of March 3, 1891.

Section 128 of the Judicial Code provides for appeals and writs of error from the *District Courts of the United States,* including the United States District Court for Hawaii, to the Circuit Courts of Appeals, excepting only those cases which may be taken direct to this Court, as provided in Section 238 of the Code, and except as provided in Sections 239 and 240, which, respectively provide for the certification of questions to this Court by the Circuit Court of Appeals, and for certiorari by this Court. It is plain, therefore, that

Section 128 refers to federal courts only, and furthermore designates those cases in which the judgment of the Circuit Court of Appeals is final. It is also plain that the section in question *refers only* to cases of a federal character, the jurisdiction of which originates in the District Courts of the United States.

The last clause of Section 6 of the Act of March 3, 1891, reads: "In *all cases not hereinbefore, in this section*, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." Section 241 of the Judicial Code is substantially the same as the portion of Section 6 above quoted. Manifestly this portion of Section 6 referred only to such other cases of a federal character originating in the *District Courts* of the United States and not made final in the Circuit Court of Appeals. The re-enacted sections of the Judicial Code are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested.

United States vs. *Le Bris*, 121 U. S. 278, (30 L. Ed. 946).

"The primary object of this act, well known as "a matter of public history, manifest on the face "of the Act, and judicially declared in the leading "cases under it, was to relieve the court of the "overburden of cases and controversies, arising "from the rapid growth of the country, and the "steady increase of litigation; and for the accom-

"plishment of this object, to transfer a large part "of its appellate jurisdiction to the Circuit Courts "of Appeals thereby established in each judicial "circuit, and to distribute between this court and "those, according to the scheme of the Act, the en- "tire appellate jurisdiction from the *Circuit* and "*District Courts* of the United States."

American Construction Co. vs. *Jacksonville,* 158 U. S. 372, (37 L. Ed. 490).

"The jurisdiction of this Court depends upon the "nature of the case rather than upon the pecuniary "amount involved."

The Paquete Habana, 175 U. S. 677, (44 L. Ed. 321).

This Court has also decided that the ground of jurisdiction of the lower court is the test of the appellate jurisdiction of this Court from the final judgments of the Circuit Court of Appeals.

Bagley vs. *General Fire Ex. Co.,* 212 U. S. 477 (53 L. Ed. 605).

In a late case decided by this Court, and construing Sections 5 and 6 of the Act of March 3, 1891, it was said:

"The line of division is marked in Section 6 of "the Act. It is to be observed that the line of divi- "sion between cases appealable directly to this "Court, and those appealable to the Circuit Court "of Appeals, made by Section 5 of the Act, is based "upon the nature of the case or of the questions

"of law raised. But the line of division of cases "appealable from the Circuit Court of Appeals and "those not so appealable drawn by Section 6 is "different, and is determined not by the nature of "the case or of the questions of law raised, *but* "*by the sources of jurisdiction of the trial court*, "namely, the circuit or district court,—whether the "jurisdiction rests upon the character of the parties "or the nature of the case."

Macfadden vs. *U. S.*, 213 U. S. 288, (53 L. Ed. 802).

See also *Huguley* vs. *Galeton Mills Co.*, 184 U. S. 290, (46 L. Ed. 548).

The title of the Act of March 3, 1891, sheds material light on this question, for it regulates in certain cases the "jurisdiction of the Courts of the United States." It is plain, therefore, that Section 6 of the Act of March 3, 1891, and re-enacted in Sections 128 and 241, of the Judicial Code, refers only to those cases originating in the District Courts of the United States. Any other construction of Section 241 of the Judicial Code would lead to an absurdity, as hereinafter pointed out in this brief.

In the light of the foregoing decisions it appears that Sections 128 and 241 of the Judicial Code contemplate only those cases originating in the District Courts of the United States, and apply only to the Courts of the United States. If this reasoning is sound, then Section 241 has no application to the case at bar. It has been said by this Court that:

"The jurisdiction of the Supreme Court of the "United States is limited and manifestly intended "to be sparingly exercised, and should not be ex- "panded by construction."

California vs. *S. P. Co.*, 157 U. S. 229, 261, (39 L. Ed. 683, 695).

If Section 241 Allowed a Writ of Error in this Case, it would be Inconsistent with the Later Act of Congress Relating to Appeals and Error from the Courts of Hawaii.

This Court has held that the primary object of Congress in the Act of March 3, 1891, was to relieve this Court of the overburden of cases coming before it, owing to the rapid growth of the country, and to distribute the appellate jurisdiction of cases arising in the District and Circuit Courts of the United States between this Court and the Circuit Court of Appeals.

American Construction Co. vs. *Jacksonville* (supra).

If Section 241 permitted a writ of error from this Court to the Circuit Court of Appeals, it would cause an anomalous situation to arise. By the provisions of Section 246 of the Judicial Code, as amended by the Act of January 28, 1915, (Federal Sts. Ann. Supplement 1916, p. 136) appeals or writs of error from the final judgments of the Supreme Court of Hawaii may be taken and prosecuted in the Circuit Court of Appeals, where the amount involved, exclusive of costs, exceeds the sum of five thousand dollars. Prior to

this amendment, appeals or writs of error in such cases were taken directly to this Court. If Section 241 applies to this case, then it would first require a jurisdictional amount of five thousand dollars to go to the Circuit Court of Appeals and then only one thousand dollars for an appeal to this Court. This is such an inconsistency as to make the application of Section 241 to this case an absurdity; and especially so in the light of the decisions of this Court as above set forth.

As an additional evidence that Congress intended by the Act of March 3, 1911, to further restrict the right of appeal to this Court, in the cases mentioned in Section 6 of the Act of March 3, 1891, it added cases arising under the "copyright laws" and made the judgment of the Circuit Court of Appeals final therein. (Sec. 128, Judicial Code).

If the intention of Congress was to relieve this Court, as hereinbefore pointed out, then such intention would be of no avail, for Section 241 of the Judicial Code would nullify the same by allowing indirect appeals or writs of error to this Court from the final judgments of the Supreme Court of Hawaii in all cases involving more than five thousand dollars. That such was not the intention of Congress, is manifest by the Act of January 28, 1915, which substituted in such cases the Circuit Court of Appeals in place of this Court.

Congress has fixed the sum of five thousand dollars as the amount necessary to give the Circuit Court of Appeals jurisdiction in cases coming to that court

from the final judgments of the Supreme Court of Hawaii, irrespective of any federal question. On the other hand it has made the judgments of the Circuit Court of Appeals final in certain specified subjects of federal jurisdiction set forth in Section 128 of the Judicial Code, and allows appeals or writs of error to this Court in all other cases where the source of jurisdiction relates solely to cases, federal in their nature, and depending upon either the nature of the suit or subject matter, or the character of the persons involved. In one case, the amount only is important; in the other, either the character of the persons involved or the subject matter of the suit is the controlling element, as to whether or not error lies from this Court to the final judgments of the Circuit Court of Appeals.

As was said by Mr. Chief Justice Marshall, in *Cohens* vs. *Virginia,* 6 Wheat. 264, 393 (5 L. Ed. 257, 288), when referring to the two classes of federal jurisdiction:

> "In one description of cases the jurisdiction of "the court is founded entirely on the character of "the parties, and the nature of the controversy is "not contemplated by the constitution. The char- "acter of the parties is everything, the nature of "the cases nothing. In the other description of "cases the jurisdiction is founded entirely on the "character of the case, and the parties are not con- "templated by the constitution. In these the na- "ture of the case is everything, the character of the "parties nothing."

As a logical conclusion then, it follows that Section

241 of the Judicial Code applies only to cases of a federal character and arising in the District Courts of the United States, and not to appeals or writs of error from the final judgments of the Circuit Court of Appeals, in cases taken from the Supreme Court of Hawaii to that court, where there is no federal question involved, and where the source of jurisdiction of the Circuit Court of Appeals depends solely on the amount involved. It was certainly not the intention of Congress to give two appeals from the final judgments of the Supreme Court of Hawaii. The test of the jurisdiction of this Court of cases similar to the one at bar, where no federal question is involved, is whether error would lie directly from this Court to the final judgments of the Supreme Court of Hawaii. If error does not lie, then by allowing error to the Circuit Court of Appeals would permit that to be done indirectly which could not be done directly.

As said by this Court:

> "In the exposition of statutes, the established "rule is to be deduced from a view of the whole "statute, and every material part of the same; and "where there are several statutes relating to the "same subject, they are all to be taken together, "and one part compared with another in the con- "struction of any one of the material provisions, "because in the absence of contradictory or incon- "sistent provisions, they are supposed to have the "same object and as pertaining to the same system. "Resort may be had to every part of a statute, or, "where there is more than one in pari materia, to

"the whole system, for the purpose of collecting "the legislative intention, which is the important "inquiry in all cases where provisions are ambigu- "ous or inconsistent. Rules and maxims of inter- "pretation are ordained as aids in discovering the "true intent and meaning of any particular enact- "ment; but the controlling rule of decision is, that, "whenever the intention of the legislature can be "discovered from the words employed, in view of "the subject matter and the surrounding circum- "stances, it ought to prevail, unless it lead to "absurd and irrational conclusions, which should "never be imputed to the legislature, except when "the language employed will admit of no other "signification."

Kohlsaat vs. *Murphy*, 96 U. S. 153, (24 L. Ed. 844).

The Act of January 28, 1915, Merely Substituted the Circuit Court of Appeals as a Court of Final Review in Place of this Court so as to Relieve it of the Overburden of Cases.

Section 246 of the Judiciary Act of March 3, 1911 (Act of March 3, 1905, Sec. 1465, c. 3, 33 St. L. 1035), allowed the prosecution of writs of error and appeals from the final judgments of the Supreme Court of Hawaii to this Court in the same cases and within the time and in the same manner as appeals or writs of error could be taken from the final judgments of the highest court of a State. It also provided for the prosecution of writs of error and appeal to this Court from

the final judgments of the Supreme Court of Hawaii in all cases wherein the amount involved, exclusive of costs, exceeded the sum or value of five thousand dollars. The last clause of the act in question was an amendment to Section 86 of "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900.

Section 246, as amended by the Act of January 28, 1915, re-enacted the first portion of Section 246, but added writs of error and appeals from the Supreme Court of Porto Rico. The amended act also provides:

> "* * * and in *all other cases, civil or criminal,* "in the Supreme Court of Hawaii or the Supreme "Court of Porto Rico, it shall be competent for "the Supreme Court of the United States to re- "quire by certiorari, upon the petition of any party "thereto, that the case be certified to it, after final "judgment or decree, for *review and determination,* "with the same power and authority as if taken to "that Court by *appeal or writ of error.*"

The last sentence of the amended section provides for the taking of appeals and the prosecution of writs of error to the Circuit Court of Appeals from the final judgments of the Supreme Courts of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, exceeds the value of five thousand dollars.

It will thus be seen that the Act of January 28, 1915, not only covered the whole subject of the first, but added new provisions, to wit, certiorari by this Court from the final judgments of the Supreme Courts of Hawaii and Porto Rico, *in any case, civil or crim-*

inal, and irrespective of the amount involved, or the character of the subject matter; and in addition thereto transferred the former appellate jurisdiction of this Court in cases involving more than five thousand dollars to the Circuit Court of Appeals. It is manifest that the intention of Congress was to make the Act of January 28, 1915, a substitute for the Act of March 3, 1905, and therefore operated as a repeal of that act.

> "The spirit as well as the letter of a statute "must be respected; and where the whole context "of the law demonstrates a particular intent in the "legislature to effect a certain object, some degree "of implication may be called in to aid that intent. "And it is a well settled rule in the construction of "statutes, often affirmed and applied by this Court, "that even where two acts are not in express terms "repugnant, yet if the latter act covers the whole "subject of the first, and embraces new provisions, "plainly showing that it was intended as a substi- "tute for the first act, it will operate as a repeal of "that act."
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> *The Paquete Habana*, 175 U. S. 685, (44 L. Ed. 323).

The plaintiff in error could have applied to this Court for a writ of certiorari, pursuant to the Act of January 28, 1915, for Section 246, as amended, gives such right irrespective of amount or question involved; and furthermore gives this Court the same power and authority by certiorari to *review* and determine the final judgments of the Supreme Courts of Hawaii and Porto Rico *as if taken to that Court by appeal or writ of error.*

It is plain that it was the intention of Congress that the final judgments of the Supreme Courts of Hawaii and Porto Rico could be reviewed in this Court only by certiorari, and the doctrine of expressio unius est exclusio alterius applies. By electing to prosecute its writ of error in the Circuit Court of Appeals from the final judgment of the Supreme Court of Hawaii, it waived its right to a review and determination in this Court.

It is elementary that the right to appeal and error are conferred only by statute, which must be strictly complied with. There is nothing contained in the Act of January 28, 1915, which allows error from this Court to the final judgments of the Circuit Court of Appeals in cases of the character of the case at bar. If it had been the intention of Congress to give such right, it would have said so in the act. On the contrary, it is plain that Congress did not so intend, for it specifically provided for a writ of certiorari.

The Journals of Congress Show that it was the Intention to Make the Judgment of the Circuit Court of Appeals Final.

It is an elementary principle in the law of statutory construction, when endeavoring to interpret the true intent of the lawmakers, that resort may be had to the legislative journals of proceedings.

The bill as originally introduced in the House of Representatives (H. R. 19,076) shows that error from this Court to the final judgments of the Supreme Court of Hawaii as allowed by Section 246 of the Judicial

Code was eliminated and certiorari added in such cases. (Congressional Record—House, Dec. 16, 1914, p. 282.)

The Judiciary Committee of the Senate reported favorably on the bill and reported the purpose of the change in Section 246 as follows:

> "(2) Relieving the Supreme Court of theUnited "States from the necessity of reviewing such cases "from the Supreme Courts of Porto Rico and Ha- "waii as involve no federal question, but depend "entirely on the local or general law, etc."
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> Congressional Record—Senate, Dec. 21, 1914, p. 435.

On January 14, 1915, the amendment again came before the Senate as reported by its Judiciary Committee (Congressional Record—Senate, Jan. 14, 1915, pp. 1542, 1543) and finally an amendment was proposed to the effect that the Circuit Court of Appeals be substituted for this Court in cases involving more than five thousand dollars, and in such form the section was passed (Congressional Record—Senate, pp. 1544, 1545 and 1546). From a reading of the pages above referred to, it is plain that the primary object of Congress was to relieve this Court of the burden of cases coming before it by substituting the Circuit Court of Appeals as the court of final review in cases similar to the one under consideration. By no reasonable interpretation can it be inferred that Congress intended to give any further or additional right of appeal to this Court.

In view of the whole scheme of the Act of March 3, 1891, and the decisions of this Court under it, the Act of March 3, 1911, and the Act of January 28, 1915, it is plain that no writ of error lies from this Court. When the various acts of Congress are taken into consideration, together with the clear intent of the Act of January 28, 1915, as contained in the debates and reports in the Congressional Record, it becomes manifest that this writ of error was prosecuted solely for the purpose of delay, and clearly within the provisions of Section 2, Rule 23, of this Court, the penalties of which we respectfully ask the Court to impose. Appeals for the purpose of delay are too prevalent in our judicial system, and we respectfully submit the only way of curbing the activity of litigants in this particular, and thus in a measure relieving an already overburdened court, is to enforce the rule provided in such cases.

We respectfully submit that the motion to dismiss for want of jurisdiction should be granted, together with damages for the delay herein.

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